

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

LAW OFFICES OF JACK A. DONENFELD, A LEGAL PROFESSIONAL ASSN.,	:	APPEAL NO. C-070641 TRIAL NO. A-0600377
	:	
Plaintiff-Appellee,	:	<i>JUDGMENT ENTRY</i>
vs.	:	
MARTHA A. McADAM,	:	
Defendant-Appellant.		

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellee the Law Offices of Jack A. Donenfeld, a Legal Professional Association (“the law firm”) brought this action against defendant-appellant Martha A. McAdam (“McAdam”) and her brother, Hugh McAdam, III (“Hugh”), to recover unpaid fees for legal services performed by attorney Jack A. Donenfeld on behalf of the defendants and Multifold International, a division of International Paperbox Machine Company, the McAdams’ former closely held corporation. The law firm sought to recover under several alternative theories, including breach of an express contract, breach of an implied contract, quantum meruit, and promissory estoppel. It later amended the complaint to add claims for fraud and punitive damages. The firm requested leave to amend the complaint a second time, which McAdam opposed in part because the evidence

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

to support the claim sought to be added, spoliation of evidence, would be presented to the court in support of the existing claims, and, therefore, amendment was not needed. The law firm apparently withdrew the motion prior to trial to avoid delay.

The proceedings were stayed and ultimately dismissed without prejudice as to Hugh, who had filed for bankruptcy. The law firm moved for summary judgment against McAdam, relying upon Donenfeld's affidavit, which detailed McAdam's representations and authenticated correspondence that had been attached as exhibits A through G. McAdam presented her own affidavit in opposition. She alleged that exhibit G to Donenfeld's summary-judgment affidavit had been altered such that the words "Agent for Multifold/IPBM, Inc." had been redacted after her signature, and she attached her own "copy" of plaintiff's exhibit G. The court did not journalize an entry disposing of the summary-judgment motion, and we presume that it was denied because the court set the case for a bench trial on January 22, 2007.

A few days before the January trial date, McAdam moved for a continuance. The trial court did not journalize an entry disposing of the continuance motion. But the court continued the trial for some reason, as the trial did not begin until February 28, 2007, before a visiting judge. On that date, McAdam's attorney informed the court that the prior judge had overruled the law firm's motion for summary judgment and McAdam's motion for a continuance. Testimony was taken on February 28, March 1, and June 26.

The only two witnesses were Donenfeld and Richard Bond, an expert in information technology, who testified that two emails that McAdam had presented in defense of the lawsuit had been altered. The court found against McAdam for breach of contract, holding that McAdam had expressly agreed to personal liability for the legal services provided to Multifold and IPBM. The court also found against McAdam for fraud, holding that McAdam's misrepresentations concerning her indebted companies and her purpose in retaining the law firm to represent those companies had damaged the law firm. Finally, the court determined that McAdam had committed fraud on the law firm and the

court to avoid liability by altering two documents and presenting false facts in two affidavits. The court concluded that McAdam's intentional falsification and alteration of correspondence, as well as her presentation of false statements in her affidavit, amounted to actual malice supporting an award of punitive damages.

The court awarded the law firm \$54,129.06 in compensatory damages and the \$25,625.56 in attorney fees and costs that the law firm had expended to recover those damages. Further, the court awarded punitive damages of \$54,000, for a total judgment of \$133,788.62.

Martha McAdam did not attend any of the trial proceedings. She now appeals the trial court's judgment.

McAdam first argues that the denial of her request for a continuance was an abuse of discretion, where she had alleged that she was unable to appear at trial due to a temporary medical disability, and where there was no compelling reason to try the case immediately.

This argument is feckless. McAdam moved to continue only the January trial date. Although the court did not journalize an entry disposing of the motion, the court did in fact delay the commencement of the trial for several weeks. Further, counsel for McAdam did not renew the continuance request when the trial began at the end of February. Rather, counsel advised the court that McAdam was ready to proceed to trial and expressed surprise at his client's absence. Further, on the June trial date, counsel blamed McAdam's absence on her challenge to the court's jurisdiction over her.

Moreover, McAdam's motion for a continuance was only supported by an unsworn, unauthenticated doctor's note dated November 15, 2007, stating that McAdam "would have great difficulty travelling at this time." The note said nothing about her condition in January 2007, when her motion had been filed, or in February, March, and June 2007, when the trial was actually held, and it failed to indicate whether McAdam

could have appeared within a reasonable time. Thus, McAdam failed to establish a sufficient ground for a continuance.<sup>2</sup>

Where McAdam failed to establish a sufficient ground for a continuance, and counsel did not renew the continuance request at the February trial, we cannot say that the trial court abused its discretion to McAdam's prejudice.

Next, McAdam contends, for the first time, that the breach-of-contract claim was barred by the statute of frauds. Because McAdam failed to raise this affirmative defense in the trial court, she is precluded from raising the issue on appeal. Thus, we do not address the merits of her argument.

McAdam also challenges the judgment for fraud, arguing that the law firm had failed to plead fraud with particularity and that the judgment was not supported by the evidence.

Under Civ.R. 9(B), fraud must be pleaded with particularity in the complaint. While the law firm's amended complaint did allege fraud with particularity, the misrepresentations cited were not the ones presented at trial to support the fraud claim that the law firm ultimately prevailed upon. But the record establishes that McAdam was fully aware of the misrepresentations that supported the judgment and that the law firm had presented these misrepresentations in support of the successful claim. Moreover, McAdam's attorney cross-examined the witnesses on the issues and had the opportunity to address the issues. And McAdam chose not to attend the trial, much less to testify in her own defense. In light of these facts and the lack of an objection at trial, the prevailing theory of fraud was tried by the implied consent of the parties and, therefore, must be

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<sup>2</sup> *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 45 N.E.2d 763, paragraph two of the syllabus.

treated as if it had been raised in the pleadings, notwithstanding any defect in formal pleading that may have been in the amended complaint under Civ.R. 9(B).<sup>3</sup>

Finally, we reject McAdam's assertion that the law firm failed to establish the elements of fraud. The evidence supports the trial court's determination that the law firm had relied upon McAdam's material and false representations, that it was justified in doing so, that McAdam had intended such reliance, and that, as a result of McAdam's false representations, the law firm undertook and maintained the legal representation, suffering damage to its reputation and the unpaid legal fees.

Moreover, where the record contains proof of actual damages for the underlying claims, and the intentional alteration of documents supported a finding of actual malice by clear and convincing evidence, we hold that the award of punitive damages was proper.<sup>4</sup>

Accordingly, we overrule the assignments of error and affirm the trial court's judgment.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

**HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 17, 2008  
per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>3</sup> Civ.R. 15(B); See *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, 448 N.E.2d 1159; *McCartney v. Universal Elec. Power Corp.*, 9th Dist. No. 21643, 2004-Ohio-959, at ¶17; *A.G. Hauck Co. v. Toll Gate Square* (June 29, 1977), 1st Dist. No. C-76364.

<sup>4</sup> See *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331.